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Attorneys for Defendant NexTag, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Louis Vuitton Malletier, S.A.,

Plaintiff,

v.

NexTag, Inc., et al.

Defendants.

) Case No.: 3:07-cv-03763-MMC

)
) JOINT CASE MANAGEMENT
) STATEMENT AND [PROPOSED]
) ORDER

) Conference Date: November 30, 2007

) Time: 10:30 a.m.

) Court: Hon. Maxine M.
Chesney

The parties to the above-entitled action submit this Joint Case Management Statement and request the Court to adopt it as the Case Management Order in this case, pursuant to Federal Rule of Civil Procedure 16 and Civil L.R. 16-10(b).

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3 **JOINT CASE MANAGEMENT STATEMENT**

4 1. **Jurisdiction and Venue**

5 The claims alleged herein arise under the Trademark Act, 15 U.S.C. § 1051, et seq., and
6 under the Copyright Act of 1976, 17 U.S.C. § 101, et seq., for (i) infringement of trademarks
7 registered in the United States Patent and Trademark Office, (ii) contributory and vicarious liability
8 for counterfeiting; and (iii) contributory and vicarious liability for copyright piracy. This Court has
9 original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, 28 U.S.C.
10 §§ 1331, 1332 and 1338. This Court has personal jurisdiction over the Defendant because it does
11 business and is incorporated, and/or is authorized to do business in the State of California. Venue
12 is proper in this judicial district pursuant to 28 U.S.C. § 1391. The named defendant has been
13 served and filed an Answer to the Complaint.

14 2. **Facts**

15 Plaintiff Louis Vuitton Malletier, S.A. ("Plaintiff" or "Louis Vuitton") seeks money
16 damages and injunctive relief against Defendant NexTag, Inc. ("Defendant" or "NexTag") for what
17 Plaintiff contends was NexTag's promoting and advertising the sale counterfeit and infringing
18 merchandise bearing unauthorized reproductions of Plaintiff's intellectual properties and for
19 contributing to the further promotion, distribution and sale of such merchandise by third-party
20 merchants. In particular, Plaintiff alleges that Defendant aids and abets the distribution and sale of
21 counterfeit and infringing merchandise by providing comparison of online sellers of Louis Vuitton
22 counterfeit and infringing merchandise. Plaintiff contends NexTag does so with knowledge by
23 advertising Internet users' ability to compare offers of so-called "replica" product. Plaintiff
24 contends NexTag's advertising in support of its comparisons service consists of: (1) diversion
25 traffic to its website using advertising which embodies the Louis Vuitton trademarks, (2) routing
26 Internet traffic to websites selling counterfeit, piratical and infringing merchandise. Plaintiff
27 further contends NexTag's infringements were willful insofar as it failed to discontinue the
28 infringing offers and activity despite written notice to do so.

1 Defendant NexTag is an internet service provider that operates a shopping-oriented search
2 engine and website that allows users to search or browse for advertisements for products and
3 services offered for sale by third-party merchants. Thousands of third party merchants include
4 advertisements for millions of products and services on NexTag's sites, ranging from baby cribs to
5 flowers, food baskets, kitchen supplies, office products, sports equipment, and video games, to
6 mortgages, travel services, and online degrees. By clicking on hyperlinked listings, consumers
7 leave the NexTag site and access the merchants' websites, where the consumers may take
8 advantage of whatever features the merchant makes available, such as reviewing and comparing
9 product information, reading customer reviews of products and services, purchasing listed products
10 and services or otherwise engaging with the merchant. NexTag contends that it does not have any
11 control over the content or features of the third-party merchants' websites or the products or
12 services offered for sale by the third-party merchants. NexTag contends that it cannot prevent a
13 third-party merchant from selling a particular product or from including particular content or
14 features on its website. NexTag contends that it does not sell any of the products or services that
15 merchants advertise on its site, inventory them, or ship or otherwise provide them to consumers.
16 As a practical matter, NexTag states that it cannot manually review each of the millions of products
17 and services listed on its site by third parties.

18 NexTag contends it was unaware of the listings of any counterfeit Louis Vuitton
19 merchandise or merchandise bearing unauthorized reproductions of Plaintiff's intellectual
20 properties before receiving notice from Louis Vuitton earlier this year. After receiving Louis
21 Vuitton's notice alleging infringing merchandise was listed on its site, and investigating those
22 allegations, NexTag contends that it expended considerable time and effort attempting to remove
23 all listings of handbags and accessories described in any way as "Louis Vuitton" from its site.
24 NexTag has not removed from its site listings of books about Louis Vuitton, which Louis Vuitton
25 has not asserted infringe its intellectual property rights. NexTag contends that it has not directly,
26 contributorily, vicariously, or willfully infringed any of Louis Vuitton's intellectual property.
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1 Further, NexTag asserts that any alleged use of the Louis Vuitton marks in advertising constitutes
2 nominative fair use.

3 3. Principal Legal Issues in Dispute

4 The principal legal issues in dispute relate to the degree of Defendant's responsibility for
5 third party actions and Defendant's control and knowledge regarding those actions.

6 4. Motions

7 Plaintiff believes a motion for summary judgment as to liability and/or entry of a
8 preliminary injunction may be appropriate. Defendant believes a motion for partial or complete
9 summary judgment as to liability may be appropriate.

10 5. Additional Parties

11 The Parties do not, at this time, contemplate the amendment of pleadings for any reason,
12 including the addition of new parties, but they acknowledge that information disclosed in discovery
13 may make addition of new defendants prudent and a more efficient use of the Court's resources.
14 However, the Parties agreed that an additional 90 days from the date of the case management
15 conference to amend the pleadings is appropriate.

16 6. Evidence Preservation

17 The Parties indicated that each corporate party has policies designed to preserve relevant
18 materials. The Parties agree that they need not undertake any additional measures beyond their
19 current policies to preserve electronic evidence.

20 7. Disclosures

21 The Parties agree that disclosures under Rule 26(a)(1) will be made on or before the case
22 management conference.

23 8. Discovery

24 The Parties do not believe that discovery should be conducted in phases, or limited to
25 certain issues and have agreed to exchange initial disclosures by November 30, 2007.

26 The Parties anticipate propounding written discovery and taking depositions, if necessary.

27 9. Class Actions

1 Not applicable.

2 10. Related Cases

3 There are no related cases or proceedings to report.

4 11. Relief

5 Plaintiff contends it may elect statutory or actual damages but is not prepared to make that
6 election at this time. Plaintiff may elect statutory damages under the Copyright Act which entitles
7 it to as much as \$150,000 for each copyright willfully infringed upon and actual damages (either
8 damages to plaintiff or Defendant's lost profits) under the Trademark Act which may be trebled
9 should willfulness be proved. Plaintiff also seeks its attorneys fees under the Copyright Act and
10 Trademark Act. In any event, Plaintiff will seek entry of a permanent injunction.

11 12. Settlement and ADR

12 The Parties have discussed settlement before and during their early meeting. The Parties
13 propose a settlement conference before the magistrate judge but note that any alternative dispute
14 option would be more constructive after certain disclosures and/or discovery has been completed.

15 13. Consent to Magistrate Judge for All Purposes

16 The Parties do not consent to assignment of this case to a United States Magistrate Judge.

17 14. Other References

18 The Parties agree this case is not suitable for reference to binding arbitration, special
19 master, or the Judicial Panel on Multidistrict

20 15. Narrowing of Issues

21 Not applicable.

22 16. Expedited Schedule

23 The Parties agree this is not the type of case that can be handled on an expedited basis.

24 17. Scheduling

25 The parties propose that all documents will be produced by May 22, 2008.

26 The parties propose that privilege logs will be exchanged by June 13, 2008.

27 The parties propose a discovery cutoff date of July 23, 2008.

1 The parties propose that the party with the burden on any issue shall designate experts by
2 August 15, 2008.

3 The parties propose that rebuttal experts will be designated by October 1, 2008.

4 The parties propose the expert discovery cut-off date of October 29, 2008.

5 The parties propose a final motion cutoff date of January 9, 2009.

6 The parties propose a pretrial conference date of February 2, 2009.

7 The parties propose a trial date of February 16, 2009.

8 18. Trial Estimate

9 The Parties have requested trial by jury. They estimate a trial of approximately five (5)-six
10 (6) court days.

11 19. Disclosure of Non-party Interested Entities or Persons

12 Plaintiff states that pursuant to Civil Local Rule 3-16, as of this date, there are no other
13 interests involved other than the named parties.

14 Defendant states that Pursuant to Civil L.R. 3-16, the following listed persons, associations
15 of persons, firms, partnerships, corporations (including parent corporations) or other entities (i)
16 have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii)
17 have a non-financial interest in that subject matter or in a party that could be substantially affected
18 by the outcome of this proceeding: Providence Equity Partners VI L.P.; Providence Equity Partners
19 VI-A.L.P.; Morgenthaler Venture Partners V, L.P.

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20. Other Issues

The parties did not identify any other issues affecting case management.

Dated: November 19, 2007

J. Andrew Coombs, A Professional Corp.

By: /s/ J. Andrew Coombs
J. Andrew Coombs
Annie S. Wang
Attorneys for Plaintiff Louis Vuitton Malletier, S.A.

Dated: November 19, 2007

Quinn Emanuel Urquhart Oliver & Hedges, LLP

By: /s/ Claude M. Stern
Claude M. Stern
Margret M. Caruso
Bobbie Eftekar
Attorneys for Defendant NexTag, Inc.

PURSUANT TO STIPULATION, IT IS SO ORDERED:

Dated:

Hon. Maxine M. Chesney
United States District Judge, Northern District of
California